



A Town Official's Guide to
Procurement
Using ARPA Funds

Introduction

Sometimes, buying stuff can be a little too easy. You click a few buttons, packages arrive on your doorstep, and then you wonder if you really *needed* an emerald green Dutch oven (maybe that's just the author, and yes, she did). But when you are using public funds, there are actually laws to help ensure that purchasing is done responsibly, and different laws apply depending on the amount that you spend, the type of services you're obtaining or things you're looking to buy, and the source of the money.

With all sorts of different rules it can sometimes get confusing, and it's easy to think that procurement means competitive bidding or conflate a bunch of different ideas. But procurement just means getting stuff/services. Procurement laws are what you have to follow to get the stuff/services, and something like competitive bidding is a way/method you can (and sometimes must) use to get stuff/services.

When it comes to using ARPA funds, there are layers of rules towns have to follow (the U.S. Treasury says so right [here](#) on page 8):

- Local procurement rules
- New York State procurement rules (General Municipal Law § 103)
- Federal procurement rules (Uniform Guidance §§ 2 CFR 200.317–2 CFR 200.327)
 - o *There are a few specific sections of the Uniform Guidance that do not apply; you can find out more information at the Assistance Listing available at SAM.gov available [here](#) (or search for Assistance Listing 21.027); just look under the subheading "Policy Requirements"

Use this guide to figure out when and what rules towns have to follow when procuring (i.e. getting) things specifically using ARPA funds. You may be less familiar with the federal requirements, but the Treasury has specifically stated that federal procurement rules apply when using ARPA money, so we encourage you to look over that section carefully and/or the regulations themselves. However, it is not the be-all-end-all of procurement; we repeat this sentiment over and over again throughout the guide simply because

we don't want anyone walking away thinking that after reading this they know everything about procurement. This guide should be used as a primer that provides an overview of the procurement landscape and hopefully points you in the right direction. If and when you need to know more about procurement, there are lots of resources – we love the Office of the State Comptroller at AOT and [this comprehensive and useful guide](#). Also, make sure that you work with the town employees / officers involved in procurement, whether that's the finance director, bookkeeper, town attorney or whomever – no person is an island.

Reading laws together and overlapping laws

With three different levels of procurement laws towns have to follow, you'll find that a lot of the laws overlap, or one law might require something different than another law. Local governments must follow local policies and New York Law to the extent that federal requirements are more restrictive than local policies and state law. If there is an overlap with local, state, and federal rules, and none of the rules are more restrictive than another, the federal rules will apply (see 2 C.F.R. § 200.318[a]). In other words, you might not be required to do something under federal rules, but if local rules require it, you still have to follow your local rule. For example, if you don't have to competitively bid a contract under federal rules but your local procurement policy requires it, you still have to competitively bid using your local rules. Or, another example, when federal competitive sealed bidding requirements apply you have to get at least two responsible bidders, but there's no minimum under state law – the federal rule is "more restrictive," so you have to follow the federal rule.

We hope this guide helps you navigate procurement laws, and happy purchasing.

Local Procurement Rules

Every town must have a procurement policy (see General Municipal Law § 104-b). Generally speaking, your procurement policy applies most often for smaller purchases or when a federal or state rule does not apply, so always refer to your town's policy when purchasing. The town board sets the policy and adopts it via resolution. The board can periodically update the policy or adopt a new

one as needed. AOT members can obtain sample policies by emailing us at info@nytowns.org or calling our office at (518) 465-7933.

There are a few provisions that the town is statutorily required to include in its policy (like who has the authority to make purchases and what documentation is required), but the substance of those provisions is a determination of the town board and there is a lot of flexibility – towns are so different across New York that what makes sense for one town might not make sense for another. Please keep in mind that state and federal procurement rules may also apply, thus limiting some of the town's autonomy on how to go about procuring goods or services. So, for example, if state rules apply to your purchase, and they differ from what's required in your local policy, you have to follow the state rules. The following are common / required provisions found in procurement policies, although the actual requirements may differ:

1. Authorization for certain officers to make purchases up to a certain amount without preapproval.

Absent a few exceptions listed in statutes, a town employee or officer needs town board approval before making any purchases. The local procurement policy provides an opportunity to craft some more exceptions to this rule. For example, if there's a snowstorm coming and the windshield wipers on the plow suddenly break it seems fairly impractical to have the town board convene and approve the purchase of new wiper blades before the highway superintendent can make that purchase. The procurement policy can have a provision that authorizes the highway superintendent (or any officer) to make purchases up to a certain amount without getting preauthorization from the town board. This doesn't mean the officer with that authority can go hog wild; the claim still has to be audited and approved by the town board using the procedure outlined in Town Law Article 8.

2. Methods of procurement.

Remember how the introduction said that competitive bidding was a way to procure stuff or services? Most of the time, we think

of competitive bidding as synonymous with NYS procurement laws, but even if state competitive bidding rules do not apply, the town can still impose its own competitive bidding requirements in the local procurement policy. For example, the policy might have a provision stating that the town has to go out to bid for any purchase over \$10,000. Or it might leave all purchases under \$500 up to the discretion of the purchasing agent. Maybe purchases over \$1,000 have to have two verbal quotes but not written quotes. Again, there is a lot of flexibility—do what makes sense for your town.

3. Required documentation.

The town should have specific documentation requirements related to purchases, and the procurement policy is the place to spell out exactly what is needed. Having clear documentation standards in the procurement policy also helps make the auditing process go smoothly

4. Exceptions to the policy.

The town board makes the local rules for buying and getting services, but it can also make exceptions to the rules. For example, the policy might state that every purchase over \$5,000 has to be competitively bid, but it can also say bids are not necessary in emergency situations or for professional services like attorneys or insurance.

5. Who can make purchases.

Yes, the town board approves purchases and contracts, but depending on the size and needs of the town, you might also have a purchasing director, or you might want to give authority to the supervisor, highway superintendent, town clerk to make certain purchases below a certain threshold at their discretion.

Some words of unsolicited advice on your local procurement policy – keep the language of the policy simple to prevent mishaps and misunderstandings and make the process as transparent as possible. There's no reason why someone should need a secret decoder ring to understand the policy, and you're not impressing anyone with your run-on sentences filled with

heretofores and theretos (this may be the author lecturing herself). Also, make sure whatever you adopt makes sense for you town – there is no one-size-fits-all policy, so even if you get a sample from the Association of Towns, you can use that as a starting point and adapt it to fit your needs.

State Procurement Rules

Purchases over \$20,000 and public works contracts over \$35,000 trigger the state competitive bidding rules found under General Municipal Law § 103. Like any rule, there are exceptions and exemptions, but first, let's look at the basics of the competitive bidding process required by New York State. Again, this guide is meant to be a primer on the topic (we want you to see the forest for the trees, not get into the weeds), so we're not going to address things like "well what happens if you have two identical bids." You can get into more of the details on state procurement by checking out the OSC guide [here](#), and we always recommend that you work with your town attorney / purchasing agent to ensure compliance.

Preferred Source

Before a town gets ready to go out to bid under state rules, it should first check to see if the goods or services can be procured from a "preferred source." Preferred source status is conferred by the state and provides employment opportunities for the blind and visually impaired, disabled, and inmates – you can read more [here](#). The Office of General Services (OGS) keeps a list of preferred source providers available [here](#). If the town can get its goods or services from a preferred source, it is **required** to do so unless the products and services offered by the preferred source are more than 15 percent higher than the prevailing market prices among responsive offerors for the same or equivalent things/services (see State Finance Law § 162).

Bid Specs

Bid specifications, or bid specs, detail exactly what product or service the town is looking for. The town may not draft the bid specs in a way meant to thwart competition. Of course, you can say what the town needs and be specific (if you want some

lawyer language, a town is "permitted to insert in its specifications proper and reasonable conditions, restrictions and requirements in the public interest" (Opn St Compt, 91-34). But, for example, if you're looking to buy a truck, your bid specs should not say that the town is looking for a Tiffany blue truck with exactly 104 miles on it, 6 doors, and custom leather brown interior that you just happen to know exists at one of your local dealerships (*note, the author does not think such a vehicle exists, but you get the point). Can you say you're looking for a truck that can hold a certain weight that has under 10,000 miles on it? Sure. You can even use brand names so long as you also have a clause saying you will also accept its equivalent (see *I. Janvey & Sons, Inc. v Nassau County*, 60 NY2d 887, 889 [1983]). Just keep in mind the public policy behind competitive bidding – competition will drive down the price, so if you draft your bid specs so that only one vendor can bid on it, you're undermining the whole purpose of competitive bidding.

Advertising, Accepting, and Opening Bids

Advertisements should have a general description of the project or products sought and the time and place of the bid opening. Five days must elapse between the date the advertisement is first published and the opening date (you want to give vendors enough time to actually submit bids). The advertisement for bids must run in any and all official newspapers, or if the town doesn't have an official newspaper, in one or more newspapers designated by the town board.

The town board can adopt a resolution accepting electronically submitted bids but make sure to include information about how to submit a bid electronically in the advertisement (e.g. include an email address where vendors can submit bids). However, a town cannot exclusively accept electronic bids; it must also accept hard copies of bids. If the town decides to go the electronic route, it must establish a procedure that is secure, documents the time and date the bid is received, authenticates the identity of the sender, and ensures that the bid is confidential until the time and date of the opening (they are, after all, supposed to be sealed bids). Finally, when the time comes to open the sealed bids, it should be done in public, and bids should be read aloud. The town board may

designate any town employee or officer with the authority to open bids.

Awarding and Rejecting Bids

The town must award the contract to the lowest responsible bidder that complied with the specs unless the town adopted a best value local law (more on that later). Unlike federal procurement rules, there is no minimum number of bids a town must receive in order to award the contract. Bids should have a statement of non-collusion and a statement complying with the Iran Divestment Act (see General Municipal Law § 103-g); however, if accidentally omitted, the town can still accept the bid and award the contract to that bidder. If no one responds, the town should readvertise, but if no one responds after the second time, then it can start negotiating directly with a vendor.

Best Value

Towns may adopt a local law authorizing them to use the “best value standard” versus the lowest responsible bidder when awarding contracts (note – this excludes contracts necessary to complete a public works project covered by Labor Law Article 8). Best value is “the basis for awarding contracts for services to the offeror which optimizes quality, cost and efficiency, among responsive and responsible offerors. Such basis shall reflect, wherever possible, objective and quantifiable analysis ... [and] may also identify a quantitative factor for offerors that are small businesses or certified minority- or women-owned business enterprises” (State Finance Law § 163). To learn more about making best value determinations, check out the section on best value in the OSC guide [here](#).

Exceptions to State Competitive Bidding Requirements

There are numerous exceptions to General Municipal Law § 103 competitive bidding requirements, some of which are spelled out in statute and other that common law exceptions (aka exceptions created by courts). Below is a list of some of the most pertinent ones for towns.

- Emergency (GML, section 103 [4]) – The situation truly must be an emergency affecting public buildings, public property or the life, health, safety or property of

residents such that it requires immediate action.

- Sole Source – Town must demonstrate that the service or good the town is looking to get is in the public interest and only available from one source and there is no equivalent so there is no possibility for competition.
- Professional services – Think attorneys, engineers, architects – more on this below under the subheading “Request for Proposals.”
- True leases – You can’t just call a contract a lease to avoid competitively bidding. Look at what the actual obligations are on the contract.
- Insurance
- Surplus/second-hand materials or supplies
- Piggybacking off other government contracts (GML § 103 [16]) Read more about the requirements to piggyback [here](#)
- Purchasing off OGS contracts

Requests for Proposals

Towns can use an RFP to solicit offers when state competitive bidding requirements do not apply (there are certain requirements under federal laws for proposals discussed below). RFPs are generally used to obtain professional services, like hiring attorneys, engineers, or architects. An RFP is typically a document providing detailed information regarding the type of service the town needs.

An RFP should also include what criteria will be used to evaluate applicants and award the contract. The town can advertise for RFPs or contact vendors directly.

Whereas competitive bidding requires the town to create specific requirements and award a contract based on the lowest bid that complies with those



requirements, the RFP is a much more participatory process. A vendor interested in providing services to the town can present its proposal on how it would meet the town's needs that are identified in the RFP, various discussions can take place, and proposals can be amended. Also, the town does not only have to take price into consideration when awarding the contract; it can also consider things like experience, reputation, availability etc.

Federal Procurement Rules

The Treasury guide on complying with ARPA says that local government and state recipients have to follow the rules found in Uniform Guidance, and sections 2 CFR 200.317 through 2 CFR 200.327 cover procurement. Also, SAM.gov has an "Assistance Listing" available [here](#) that lists which sections of the Uniform Guidance are applicable to Coronavirus Fiscal Recovery Fund recipients (yes, towns are a Coronavirus Fiscal Recovery Fund recipient). It is VERY easy to end up stuck in a cycle of cross-referencing and get overwhelmed when first looking at federal rules for procurement (maybe that's just the author), and you can check out all of the regulations [here](#) (Uniform Guidance 2 CFR 200 Subpart D). However, dear reader, it is the intent of this author and guide to stop you from falling down this federal rabbit hole, so instead of getting into some of the really in-the-weeds rules that won't apply to most towns, this goes over the requirements that are applicable to most towns and tries to point you in the right direction if additional rules may apply or if you just want to take that leap into federal procurement wonderland for yourself. But quickly, remember that these rules apply to much larger entities like states, so a lot of the time, the threshold is extremely high so that part of the federal rules won't apply to your town. Also, these rules apply to many procurements using federal funds. Thus, if your town has used FEMA funding to purchase goods or services, you are probably familiar with a lot of this information already.

Required Methods of Procurement (see 2 CFR § 200.320)

The method the town has to use to procure items or services depends on the amount of money you're spending

Micro-purchases

The federal government considers anything below \$10,000 a "micro-purchase." The town can actually increase the micro-purchase threshold, but there are certain determinations the town has to do and self-certifications which you can read more about at 2 CFR § 200.320. If it is a micro-purchase, the town doesn't have to competitively bid or get quotes under federal requirements if the town thinks the price is reasonable based on research, experience, purchase history or other information and documents it accordingly. ***Your local procurement policy still applies, so you may have to competitively bid or get quotes if required by your local rules, and if you increase the micro-purchase threshold above \$20,000 for goods and \$35,000 for services, then state procurement rules apply.

Small Purchases

These are purchases that fall in between a micro-purchase (so \$10,000 or more if your town increased the micro-purchase threshold) but are less than \$250,000, which is the federally determined simplified acquisition threshold for 2021 (these rules apply to states too, so small is a relative term). If your purchase falls under this category, the town has to obtain a price or rate quotation from "an adequate number of qualified sources as determined appropriate by [the town]. *** If you hit the \$20,000 or \$35,000 threshold you're going to have to follow NYS procurement rules anyway, and your own procurement rules are also going to apply.

Purchases over \$250,000

If, perchance, your town is getting stuff or services in excess of \$250,000 using ARPA money, then formal methods of procurement kick in, which are similar to NYS rules; however, they are not exactly the same as NYS, so we strongly recommend that you work with your town attorney / finance director / purchasing director to ensure compliance. There are basically two different

“formal methods” of procurement – sealed bidding, which is like competitive bidding, and obtaining proposals (so: using an RFP).

1. Sealed Bids

The rules for sealed bidding can be found at 2 CFR § 200.320 (c).

In sum, the town must have a complete, adequate, and realistic specification or purchase description and publically advertise and provide enough time for bidders to respond, with a time and date advertised for when the bids will be opened.

The town must solicit bids from an “adequate number of known suppliers” and have at least two responsible bidders. Bids have to be opened in public, and contract awards should be made on the basis of the lowest responsive, reasonable bidder and must take into account things such as discounts, transportation costs, and lifecycle costs. The contract must be in writing, and the town board can reject any and all bids for “sound documented reasons”

2. Proposals

If conditions are not appropriate for the use of sealed bids for a contract more than \$250,000, the town can use an RFP. The RFP must be publically advertised with the evaluation criteria and relative importance identified in the RFP. Any responses must be considered to the maximum extent practical, and the town must solicit proposals from an “adequate number of qualified sources.” The town must also have a written method for conducting technical evaluations of proposals and selecting a contractor. Contract awards should be given to a responsible firm with the most advantageous proposal, taking into account price and other factors identified in the RFP. If the RFP is for

architectural or engineering services, the town may award the contract strictly based on qualifications and does not need to factor in price.

Exceptions to competitive procurement (2 CFR 200.320)

You’ll note that even for small purchases, the town must still try to get different quotes, and federal rules generally encourage competitive purchasing. However, there are exceptions to the rule, and towns do not have to follow the small purchase or formal method competitive federal rules if:

- (1) The purchase is below the micro-purchase threshold (i.e. under \$10,000);
- (2) The item is available only from a single source;
- (3) There is a public that will not permit a delay resulting from publicizing a competitive solicitation;
- (4) The federal awarding agency expressly authorizes a noncompetitive procurement (nope, sorry, ARPA doesn’t do this); or
- (5) After solicitation of a number of sources, competition is determined inadequate.

Other federal procurement rules

Ensuring competition–2 CFR § 200.319 has a list of requirements to ensure that there is competition in obtaining products or services that require a competitive process (i.e. small purchases or those that trigger the federal formal methods/over \$250,000). These requirements include things like:

- Don’t draft specs that basically make it impossible for anyone but one vendor to bid
- Don’t have conflicts of interest
- Geographical preference is not allowed.

While you’re probably already following these rules anyway, you might want to out the regulation just to cross your t’s and dot your i’s.

General procurement standards – There are some overarching federal standards for procurement regardless of what method the town uses (see 2 CFR 200.318). These include:

- Having a documented procurement

- procedure consistent with state, federal and local standards (hello procurement policy!);
- The town is responsible for maintaining oversight over contractors to ensure they are performing in accordance with a contract;
- Have an ethics code covering conflicts of interest (NYS law also requires an ethics code);
- Avoid buying duplicative items;
- Intermunicipal agreements and sharing are encouraged;
- Using federal surplus property and equipment is encouraged;
- Only entering into contracts with responsible contractors;
- Maintaining records sufficient to detail the history of procurement;
- Contracts must have a firm price, or if it's a contract where the town would pay based on the amount of hours worked and materials used, an amount that cannot be exceeded must be set (work beyond that is done at the contractor's own risk);
- The town is the entity responsible for settling any issues or claims with the contract.

MWBE – The town must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. This includes things like placing qualified small and minority businesses and women's business enterprises on solicitation lists and assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources (see 2 CFR §200.321).

Purchasing domestically – To the greatest extent practicable under a federal award, the town must provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. This should also be indicated as a provision in the contract.

Purchasing recovered material – When using federal money, the purchase of certain materials in excess of \$10,000 must contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition (you can find the list of

items at [40 CFR part 247](#)); also, procuring solid waste management services must be done in a manner that maximizes energy and resource recovery (see 2 CFR 200.323).

Contract cost and price (2 CFR § 200.324) – If the contract is for more than \$250,000, the town must perform a cost or price analysis. The method and degree of analysis depends on the circumstances, but as a starting point, make independent estimates before receiving bids or proposals. For any contract where there is no price competition – and for all contracts in excess of \$250,000 – profit must be negotiated as a separate element.

Prohibition on certain telecommunications and video surveillance services or equipment – The town may not contract with Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities) for telecommunications or video surveillance equipment (see 2 CFR 200.216).

Other Potentially Required Contract Provisions

Contracts must contain the following provisions (if applicable).

- Contracts over \$250,000 have to have clauses addressing administrative, contractual, or legal remedies if a contractor violates or breaches contract terms and provide for such sanctions and penalties as appropriate.
- All contracts in excess of \$10,000 must address termination for cause and for convenience by the town including the manner by which it will be effected and the basis for settlement.
- Equal Employment Opportunity – If you are using federal funds for a construction contract, the contract must include the federal equal opportunity clause provided under 41 CFR 60-1.4(b). *Construction work* means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision,

- inspection, and other on-site functions incidental to the actual construction.
- Davis-Bacon Act, as amended (40 U.S.C. 3141-3148) – Davis-Bacon rules (aka federal prevailing wage rules) apply when the program legislation says it applies to construction contracts. ARPA legislation does not state that Davis-Bacon applies, and therefore, you do not have a Davis-Bacon clause in contracts funded by ARPA; however, if you're combining ARPA funds with other federal funds on prime construction contracts in excess of \$2,000, those other federal funds may trigger Davis-Bacon rules.
 - Construction contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), which provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled.
 - Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by local governments in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704.
 - Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387). Contracts in excess of \$150,000 must contain a provision that requires agreeing to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387).
 - Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) – Contractors that apply or bid for an award exceeding \$100,000 must file the required certification basically saying they haven't used federal funds to lobby at the federal level.

Looking for an ARPA Consultant?

The Association of Towns is keeping tabs on companies that are working on ARPA projects and are acting as consultants. For general inquiries regarding ARPA, AOT members can call our office at (518) 465-7933, M-F, 8:30 a.m. - 5 p.m. or check out our *Town Official's Guide to the State and Local Coronavirus Recovery Funds with Questions Answered*. For more specific questions about potential projects, AOT is aware of the following businesses providing consulting services:

ARPA Consultants*

1. Laberge Group
Benjamin H. Syden - A.I.C.P.
Vice President
(518) 458-7112 x126
(518) 577-5494 cell/home office
www.labergegroup.com

2. MRB Group / SmarterLocalGov
Matt Horn, Director of Municipal Services
571-439-0845
mrbgroup.com

**If you or a business you know of is handling ARPA projects or are an ARPA consultant, please email lschirmer@nytowns.org so we can add you to the ARPA directory.*